

Appl. No. : 10/689,199  
Filed : October 20, 2003

### REMARKS

In response to the Office Action mailed May 5, 2006, Applicant respectfully requests the Examiner to reconsider the above-captioned application in view of the foregoing amendments and the following comments.

#### Elections/Restrictions

Applicant acknowledges the withdrawal of Claims 21-25 and 36-52 from the present application. These claims have now been canceled without prejudice.

#### Double Patenting

Claim 26 stands rejected on the ground on non-statutory obviousness-type double patenting over Claim 1 of U.S. Patent No. 6,749,614. Applicant respectfully disagrees with the rejection of this claim. Nevertheless, as explained below, Claim 26 has been amended. Accordingly, Applicant submits that the aforementioned ground for rejecting Claim 26 is moot.

#### Claim Rejections

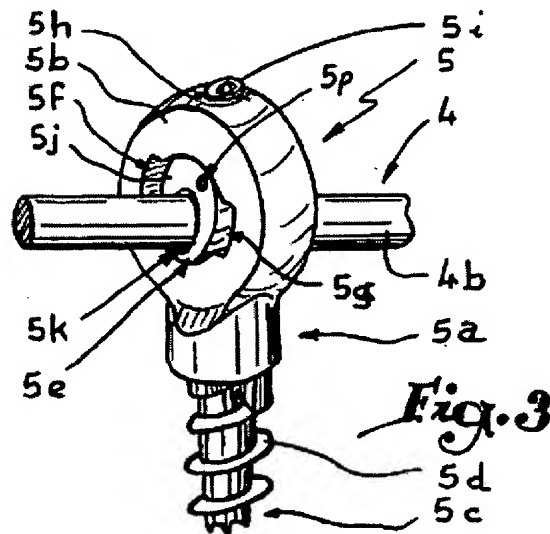
Claims 26-27 and 30-31 stand rejected under 35 U.S.C. 102(e) as anticipated by Stalcup et al. (USPN 6,336,930). Claims 28-29 stand rejected under 35 U.S.C. 103(a) as unpatentable over Stalcup in view of Gelbard (USPN 5397,363). Claims 33-34 stand rejected under 35 U.S.C. 103(a) as unpatentable over Stalcup in view of Boyce et al. (USPN 5,899,939). Claim 32 stands rejected under 35 U.S.C. 103(a) as unpatentable over Stalcup in view of Fournet-Fayard et al. (USPN 5,486,174). Claim 35 stands rejected under 35 U.S.C. 103(a) as unpatentable over Stalcup in view of Tormala et al. (USPN 5,084,051).

Applicant respectfully disagrees with the rejection of these claims. Nevertheless, to advance prosecution, Applicant has amended independent Claim 26 as outlined below. Applicant reserves the right to pursue Claims 26-35 in their original or similar form in a continuing application.

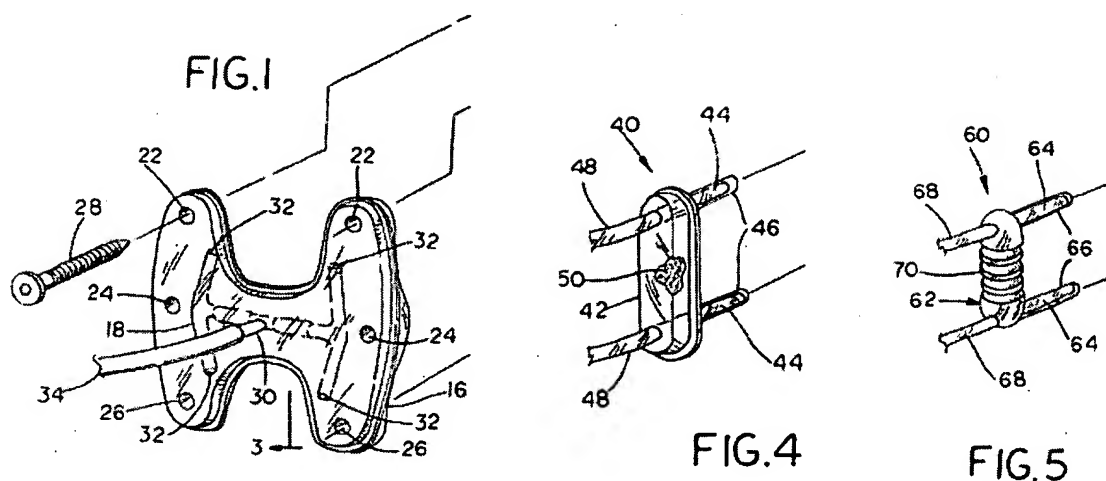
As amended, Claim 26 recites, in part, a "subcutaneously assembled in place orthopedic construct, comprising: a first bone anchor comprising a distal end and a proximal end, the proximal end including a head with a portal extending therethrough; a second bone anchor comprising a distal end and a proximal end, the proximal end including a head with a portal extending therethrough; a first support structure, configured to extend through the portals in the first and second bone anchors; a second support structure, configured to be attached to the spine."

This claim is similar to Claim 32 (which has been canceled without prejudice). Claim 32 was rejected over the combination of Stalcup and Fournet-Fayard.

Fournet-Fayard discloses a pedicle screw 3 with a head that is open along its transverse axis. The head is configured to receive an elongated rod 4, which extends through the opening in the head. See Figure 3 reproduced below.



Stalcup, in turn, discloses a bone plate 10 that generally includes a flexible bag 16, a structural support 18 within the bag and a high strength polymer surrounding the structural support 18 within the bag 16. See Col. 2, lines 22-30 and Figure 1 reproduced below. In Figure 4, Stalcup discloses an embodiment that includes projections and injections tubes 46, 44 that extend from the plate 42. Figure 5 illustrates a similar embodiment that includes projections and injection tubes 66, 64 extending from the plate 62.



Accordingly, Stalcup discloses a bone plate with a three dimensional geometry that includes projections or structures that extend along a first axis and a second axis.

Nevertheless, the Examiner states that it would have been obvious "to construct the device of Stalcup et al. having at least one screw with an aperture in the head in view of Fournet-Fayard et al. to better secure the interface between the two supports and cross-bar."

Applicant disagrees. First, Applicant notes that Claim 26, as amended, recites that the supports extend through the aperture in the bone anchor. Thus, the aperture in the screw is used to secure the support to the bone anchor and does not secure the interface between the supports and cross-bar.

Moreover, Applicant submits that the "suggested combination of references would require a substantial reconstruction and redesign of the elements shown in [the primary reference] as well as a change in the basic principle under which the [primary reference] construction was designed to operate." See MPEP 2143.01 citing *In re Ratti*, 270 F.2d 810, 123 USPQ 349 (CCPA 1959). Specifically, the combination suggested by the Examiner would require the plate of Stalcup to extend through an aperture in the head of a bone screw. If possible, this would require a complete rearrangement of the elements disclosed by Stalcup. For example, the modification suggested by the Examiner would require that the support structure and projections to be eliminated and/or modified such that they could be squeezed through, without damage, a small aperture. This would eliminate many of the advantages taught by Stalcup. For example, the projections are porous and

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allow the polymer to bond with the openings in the spine. The support structure 18 in turn is used to distribute the polymer within the bag. Thus, the combination suggested by the Examiner would involve complicated redesign of the plate taught by Stalcup. One of skill in the art would not be motivated to make such radical design changes, which eliminate many of the advantageous features of Stalcup.

For at least this reason, Applicant suggests that Claim 26, as amended, and its dependent claims are in condition for allowance.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the rejections set forth in the outstanding Office Action are inapplicable to the present claims. Accordingly, early issuance of a Notice of Allowance is most earnestly solicited.


The undersigned has made a good faith effort to respond to all of the rejections in the case and to place the claims in condition for immediate allowance. Nevertheless, if any undeveloped issues remain or if any issues require clarification, the Examiner is respectfully requested to call Applicant's attorney in order to resolve such issue promptly.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

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Dated: 9-5-06

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AMEND

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